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IN THE

Supreme Court of the United States

October Term, 1956

No. 139

DELAWARE SPORTS SERVICE, A PARTNERSHIP,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,
AND
THE STATE OF DELAWARE,
Respondents.

BRIEF OF THE STATE OF DELAWARE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1318.

DELAWARE SPORTS SERVICE, A PARTNERSHIP,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,

and

THE STATE OF DELAWARE,
Respondents.

BRIEF OF THE STATE OF DELAWARE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

STATUTES INVOLVED.

Section 671 of Title 11 of the Delaware Code provides:

§ 671. Definitions

"As used in sections 671-677 of this title, unless the context indicates a different meaning—

"Call service" means the furnishing of information upon request therefor or by prearrangement over general telegraphic, telephonic or teletypewriter exchange or toll service;

"Dissemination" means the act of transmitting, distributing, advising, spreading, communicating, conveying or making known;

"Person" or "whoever" means a corporation (including a public utility), partnership or association, as well as a natural person;

"Private wire" means any and all service equipment, facilities, conduits, poles, wires, circuits, systems by means of which service is furnished for communication purposes, either through the medium of telephone, telegraph, Morse, teletypewriter, loudspeaker or any other means, or by which the voice or electrical impulses are sent over a wire, and which services are contracted for or leased for service between two or more points specifically designated, and are not connected to or available for general telegraphic, telephonic or teletypewriter exchange or toll service, and includes such services known as "special contract leased wire service", "leased line", "private line", "private system", "Morse line", "private wire" but does not include the usual and customary telephone or teletypewriter service by which the subscriber may be connected at each separate call to any other telephone or teletypewriter designed by him only through the general telephone or teletypewriter exchange system or toll service;

"Public utility" means a person, partnership, association or corporation, owning or operating in this State equipment or facilities for conveying or transmitting messages or communications by telephone or telegraph to the public for compensation."

Section 674 of Title 11 of the Delaware Code provides:

§ 674. Business of disseminating gambling information; receiving gambling information

"No person shall engage in the business of, or receive compensation in any form or measure for, the dissemination of or receive information in furtherance of gambling or for gambling purposes by means of private wire or wires, or by means of a call service."

Section 675 of Title 11 of the Delaware Code provides:

§ 675. Revocation of service contracts; exemption from liability

"Any public utility shall, when it is advised in writing by any law enforcement agency acting within its jurisdiction that any service furnished by it is being used in the dissemination of information in furtherance of gambling, or for gambling purposes, revoke its contract to furnish any such service.

No public utility shall be liable at law or in equity for any damages or penalties, either civil or criminal, for such revocation of contract."

Section 677 of Title 11 of the Delaware Code provides:

§ 677. Sections 671-676 as exercise of police power; construction

"Sections 671-676 of this title shall be deemed an exercise of the police power of this State for the protection of the public welfare, health, peace, safety and morals of the people of this State, and all of the provisions of sections 671-676 of this title shall be liberally construed for the accomplishment of this purpose."

Section 1084(d) of Title 18 of the United States Code provides:

§ 1084. Transmission of wagering information

* * *

(d) "When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law, it

shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored."

STATEMENT OF THE CASE.

Nature and Stage of the Proceedings.

This matter is before this Court on Petitioner's Petition for a Writ of Certiorari to review the decision of February 16, 1966, of the United States Court of Appeals for the Third Circuit (P. App. 1a).[1] That decision affirmed *per curiam* the Final Order of May 13, 1965, of the United States District Court for the District of Delaware wherein the petition for an injunction was denied and the Complaint dismissed (P. App. 2a-13a).

Prior actions in this case have been in the Delaware Public Service Commission, the courts of the State of Delaware, the United States Supreme Court, the United States District Court, and the United States Court of Appeals.

On July 9, 1964, the Supreme Court of Delaware, on an appeal from the Order (R. Super. Ct.-15),[1] dated October 9, 1963, of the Superior Court of Delaware, affirmed *per curiam* (R. Sup. Ct.-7) [1] the opinion of the Superior Court. The Supreme Court Mandate of July 22, 1964 (R. Sup. Ct.-9), affirmed the Order of the Superior Court.

The Order of the Superior Court affirmed the Order (R. Com., D-23) [1] of the Public Service Commission of

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1. References to docket entries in the proceeding before the Supreme Court of the State of Delaware will be as follows: "R. Sup. Ct.- —".

References to docket entries in the proceeding before the Superior Court of the State of Delaware will be as follows: "R. Super. Ct.- —".

References to the record of the Public Service Commission will be as follows: Docket entries will be designated "R. Com., D-1," etc.; Exhibits of Intervenor, State of Delaware, will be designated "R. Com., IX-1," etc.; Exhibits of Respondent, Diamond State Telephone Company, "R. Com., RX-1," etc.; Exhibits of Petitioner, "R. Com., PX-1," etc.; Exhibits of the Commission, "R. Com., CX-1," etc.; references to pages in the transcript of the Hearing before the Public Service Commission will be designated "R. Com., H-1," etc.

References to material included in the Appendix to the Petitioner's Brief will be as follows: (P. App. —).

References to the State Court Record in this Brief are so numerous and extensive that any selection from the Record for inclusion in

Delaware, denied re-argument and permitted the Defendant, Diamond State Telephone Company, to discontinue its service to Plaintiff, Delaware Sports Service. A stay (R. Super. Ct.-16) of the Order of the Superior Court was granted pending the decision on appeal to the Supreme Court. The Order of the Superior Court was based on its opinions of August 6, 1963 (R. Super. Ct.-10) and October 7, 1963 (R. Super. Ct.-14), which were the result of the pleadings, briefs, and oral arguments of counsel before that Court.

Petitioner had previously appealed to the Superior Court from the order (R. Com., D-23) of the Public Service Commission of Delaware, dated October 10, 1962, denying a petition (R. Com., D-2) filed in that Commission by Appellant. This petition had sought relief from the proposed discontinuance of Petitioner's telephone service by the Diamond State Telephone Company, Respondent here. The order of the Commission was based on the findings and opinion of the Commission dated September 12, 1962 (R. Com., D-19) and the opinion on reargument dated October 3, 1962 (R. Com., D-22). The findings, opinion and order were the result of a four-day hearing consisting of approximately 700 pages of testimony (R. Com., D-25-27; H-1-699), some 45 exhibits (R. Com., D-28-31; IX 1-26; PX 1-14; RX 1-2; CX 1-3), the pleadings (R. Com., D-2, 4, 5) stipulations (R. Com., D-6, D-14) and briefs of counsel (R. Com., D-15-18).

Following the Mandate of the Supreme Court, the Attorney General notified the Telephone Company on August 7, 1964, of the Mandate and requested that it discontinue its service to Petitioner after 10 days therefrom unless Petitioner initiated further court remedies (P. App. 41a, 48a, 27a). Petitioner filed a Motion for a Temporary Restrain-

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an Appendix is virtually impossible, and the financial expense involved precludes reproduction of the entire Record in an Appendix. Many parts of the Record important to our case and relevant to disputed issues of fact are quoted in our Brief. The State, therefore, is not filing an Appendix with its Brief.

ing Order in the United States District Court for the District of Delaware on August 14, 1964. This Motion was denied. Petitioner then filed a Motion for a Preliminary Injunction together with his Complaint in the District Court on August 20, 1964; the State filed a Motion to Intervene; and a Brief schedule was set. The State of Delaware, Intervenor previously, was served with the Motion and Complaint and appeared as Intervenor in the District Court through the Attorney General, together with the Diamond State Telephone Company as Defendant, to support the decisions and orders of the Delaware State Courts.

Simultaneously with his action in the District Court, Petitioner sought a writ of certiorari in the United States Supreme Court. The State of Delaware and Diamond State Telephone Company appeared there as Respondents. Certiorari was denied. *Delaware Sports Service v. Diamond State Telephone Company,* 379 U. S. 965 (1965).

Subsequently Petitioner's request for injunctive relief in the District Court was also denied. 241 F. Supp. 847 (D. C. Del. 1965) and reprinted in P. App. 2a-13a. The court below affirmed *per curiam* on appeal. 355 F. 2d 929 (1966) and reprinted in P. App. 1a.

The State of Delaware does not believe that there is any value in merely replying sentence-by-sentence to the contentions in Petitioner's Brief.[2] Instead, there is a need for a complete statement of facts to explain the history of the litigation, to cover the facts which are in the entire record, and to discuss the totality of the findings and opinions of the Commission, the Superior Court, the Supreme Court, the United States Supreme Court, and the United States District Court. We rely, therefore, on our own Statement of the Case and our Argument.

History of the Litigation.

The volume of "flash" race results provided by Delaware Sports Service has helped to nourish and nurture the

2. References to Petitioner's Brief will be designated (PB- —).

malignant growth of organized bookmaking in a large part of the entire country. Telephone service is the life blood of the enterprise. Removal of this service would be a serious blow to crime. This is why we have moved from the Superior Court of Delaware, to the Court of Chancery, to the Public Service Commission, back again to the Superior Court, to the Delaware Supreme Court, to the United States Supreme Court, to the United States District Court, to the United States Court of Appeals, and now back again to the United States Supreme Court, with side trips to the District of Columbia Public Utilities Commission and the McClellan Senate Investigations subcommittee's hearings on gambling and organized crime.

The findings and opinions of the Delaware Public Service Commission and the Superior Court support the irresistible conclusion demonstrated in prior proceedings and articulated by Judge Carey in an early scene from this drama, *Tollin v. State,* 7 Terry 120, 78 A. 2d 810 (Gen. Sess. 1951):

> "This information was obviously of great help to those who receive or place bets, since it included not only racing results but also last-minute details prior to a race. Moreover, *I am not so naive as to believe that Tollin did not realize the news was being used by others to facilitate gambling.* (Emphasis supplied.)

1. Early Prosecution

Litigation with the Tollins dates back to 1950 when Joseph Tollin, deceased father of Albert Tollin, was charged with violation of Section 4063, Rev. Code of 1935, now Section 669 of Title 11 *Del. Code.* At that time, Joseph Tollin headed up Delaware Wired Music Company, Inc., which maintained equipment at 839 Tatnall Street, Wilmington, to receive and disseminate "sporting news". On appeal, the court directed a verdict of acquittal because it found that the operation of a business the same as that involved in the case at bar did not violate *that particular statute. Tollin v. State,* 7 Terry 120, 78 A. 2d 810 (Gen. Sess. 1951).

2. 1952 Legislation

Subsequent to the above case, in an effort to close the legislative gap demonstrated by that decision, the General Assembly, on January 28, 1952, enacted 48 *Del. Laws*, Chap. 493, which became 11 *Del. C.* §§ 671-677. The pertinent sections involved in this case are Sections 671, 674, 675, and 677.

3. Diamond State Telephone Co. Tariff

Diamond State Telephone Company filed a tariff with the Delaware Public Service Commission which provides as follows:

> 20. *Use of Service for Unlawful Purposes*
>
> "Service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Telephone Company receives other evidence that such service is being or will be so used."

4. Chancery Court Action

Shortly thereafter, on October 13, 1959, as a result of an investigation by the Delaware Attorney General's office in cooperation with law enforcement officers of various other states, the Attorney General sent the Diamond State Telephone Company a letter requesting it to discontinue its service to Delaware Sports Service unless Sports Service elected to test the matter in court. After Diamond State notified Delaware Sports Service, it filed a complaint on October 22, 1959, in the Court of Chancery of the State of Delaware attacking the validity of Title 11 *Del. C.* § 675 and seeking injunctive relief.

On cross-motions for summary judgment, Vice Chancellor Marvel enjoined the Telephone Company from discontinuing service to Sports Service prior to a hearing

before the Public Service Commission. *Tollin v. Diamond State Telephone Co.*, 39 Del. Ch. 350, 164 A. 2d 257 (Ct. of Ch. 1960).

This opinion was based solely on the pre-trial motions, without any evidence. The Vice Chancellor's decision was directed to the absence of a hearing provision in 11 *Del. C.* § 675, stating that "Plaintiff's motion for summary judgment will be granted to the extent of enjoining the Defendant, Diamond State Telephone, from terminating Plaintiffs' present telephone service prior to a hearing on the use to which Plaintiffs put such service."

5. Public Service Commission Hearing, Findings, and Opinion

Subsequently, a further notice was given to the Telephone Company by the Attorney General and, in turn, on November 28, 1960, to Sports Service by the Telephone Company. This action precipitated the filing of a petition by Sports Service in the Public Service Commission (R. Com., D-2). The State of Delaware, through the Attorney General, intervened in this proceeding with the consent of petitioner and respondent (R. Com., D-5). The Commission first made a decision on December 14, 1961 (R. Com., D-12), that it had jurisdiction of the petition even if all calls received by Sports Service came from outside the State of Delaware.[3] The basis for jurisdiction was 26 *Del. C.* §§ 134, 135.

Thereafter, an extensive hearing before the full Commission was held for four days, March 12-15, 1962. In addi-

3. The premise of the alleged exclusive interstate nature of petitioner's business was not conceded by either the Attorney General or the Telephone Company and later refuted by evidence before the Commission (R. Com., H-236, 252, 255). It was also shown at the hearing that Western Union money orders, paying in advance for service, might be sent to Sports Service from outside the State by persons who might then call Sports Service from within the State to obtain racing results (R. Com., H-391, 683). Thus, this issue should be moot. Petitioner contested, however, the jurisdiction of the Public Service Commission in his Motion for a Preliminary Injunction before the U. S. District Court for the District of Delaware.

tion to a considerable amount of testimony and exhibits, the Commission, on its own motion and with complete agreement by all parties, visited Sports Service at its present location at 601 Tatnall Street, Wilmington, Delaware, to get a firsthand view of the operation.

On September 12, 1962, the Public Service Commission filed its Findings and Opinion (R. Com., D-19) denying the relief prayed for in the petition of Delaware Sports Service, thus clearing the way for the removal of the telephones. After denial (R. Com., D-22) of Delaware Sports Service's petition for rehearing (R. Com., D-20), the Commission entered the order (R. Com., D-23) from which Delaware Sports Service took an appeal.

We will analyze the findings and opinion of the Commission, giving references to the page numbers thereof appearing in R. Com., D-19.

(a) *Burden of Proof.* The Attorney General and Diamond State had contended that petitioner had the burden of proof; however, the Attorney General had determined to go forward with his evidence solely for the convenience of moving the hearings forward. The Commission ruled that the Attorney General's position was "well founded" (R. Com., D-19, pp. 3-4).

(b) *Evidence.* The Commission reviewed the testimony of several of the witnesses (R. Com., D-19, pp. 5-10) which will be reviewed in detail in the next section of this Statement of the Case. The Commission discussed the question of admissibility of certain of this testimony (*e.g.*, ruled in favor of admissibility of statements of Joseph Tollin, deceased, and ruled against admissibility of certain correspondence between State Detective Wassmer and various police departments). With respect to the Commission's utilization of evidence placed before it, the Commission determined to disregard certain evidence out of fairness to petitioner, notwithstanding the provision of 26 *Del. C.* § 183 that the Commission "shall not be bound by the technical rules of evidence" (R. Com., D-19, pp. 9-11).

The Commission reviewed the evidence offered by petitioner, including the testimony of Albert Tollin (R. Com., D-19, pp. 11-15). There appears to be no controversy that Delaware Sports Service has persons working at or near various racetracks around the country, that these persons determine, by the use of a pitch-catch signal system or related scheme, the unofficial winner of a given race and telephone that information to Wilmington instantaneously. Customers of Delaware Sports Service can find out this information within 20-25 seconds after the race is over by sending a Western Union money order in advance and by thereafter calling Delaware Sports Service and receiving the name or number of the winner immediately. The question of the identity and occupation of his customers and the use of the information was the crucial inquiry. Although the Commission found that Joseph Tollin had admitted in a statement co-signed by Albert Tollin, and had expanded on this admission before the District of Columbia Public Utilities Commission that "our services have practically no value except to bookmakers and professional bettors" (R. Com., D-19, p. 8). Albert Tollin now disclaims this knowledge (R. Com., D-19, p. 14).

In addition, the members of the Commission visited the premises. Their findings, which are not elaborated on elsewhere in the record, are found at page 15 of their Opinion (R. Com., D-19, p. 15).

(c) *Findings.* The Commission, after stating that it reviewed the entire record at some length but had touched upon what it referred to as only the "more salient aspects" of the record, concluded that the record showed that there existed in the minds of Diamond State and the State of Delaware "an honest belief, if not a confirmed conviction", that Delaware Sports Service was using Diamond State's service to further illegal gambling. The Commission concluded that Delaware Sports Service had failed to rebut this conclusion, setting forth its reasons therefor in its Opinion dated September 12, 1962 (R. Com., D-19, pp. 15-20).

After publication of the Findings and Opinion of the Commission, Delaware Sports Service filed a petition for rehearing (R. Com., D-20). The petition for rehearing was not timely, but the Commission elected, in an effort of abundant fairness to petitioner, to overlook the procedural irregularity and consider the petition on the merits. The Commission qualified one finding relating to a statement concerning Albert Tollin's knowledge of his previous testimony.[4] In all other aspects the findings and opinion were unchanged (R. Com., D-22).

6. Superior Court Appeal

On appeal to the Superior Court of the State of Delaware from the order of the Public Service Commission, Petitioner's arguments related to alleged denial of due process, whether or not the Commission conformed to 26 *Del. C.* §§ 183, 187, and attacks on the evidence. The Superior Court affirmed the decision of the Public Service Commission in favor of the Telephone Company and the State. *In Re Delaware Sports Service,* — Del. —, 196 A. 2d 215 (1963).

Following this decision in the Superior Court, Petitioner then filed a motion for re-argument (R. Super. Ct.-11) which was duly answered by Respondents (R. Super. Ct.-12, 13). Petitioner's stated grounds for seeking re-argument were not only without merit, it also sought to re-litigate and repeat arguments already thoroughly considered by the court. Petitioner's motion for re-argument was therefore denied in the court's opinion dated October 7, 1963 (R. Super. Ct.-14). The appeal to the Delaware

4. ". . . Tollin's lack of knowledge primarily concerned his father's sworn testimony before the District of Columbia Public Utilities Commission. Albert Tollin's testimony before us was at variance with that of his father and his own signed statement on one very important point—the use to which bookmakers put Petitioner's service. The disparity between the sworn testimony of those who knew most about Petitioner's service cannot be diminished and was not satisfactorily explained by Petitioner. Our over-all evaluation of Albert Tollin's testimony remains unchanged, however, and we find no basis for changing the result."

Supreme Court followed the Superior Court's order (R. Super. Ct.-15) of October 9, 1963.

7. Delaware Supreme Court Appeal

The appeal of Sports Service to the Supreme Court of the State of Delaware involved virtually the same arguments as those used before the Superior Court. Following briefing and oral arguments, the Supreme Court affirmed *per curiam* on July 9, 1964, the opinion of the Superior Court (R. Sup. Ct.-7). *In Re Delaware Sports Service,* — Del. —, 202 A. 2d 568 (1964). A Motion for Reargument (P. App. 71a) was denied (R. Sup. Ct.-9). The Supreme Court then issued its Mandate of July 22, 1964, whereby the Order of the Superior Court was affirmed (R. Sup. Ct.-9).

It is significant that Petitioner advanced Federal law as being pre-emptive in his Motion for Reargument before the Delaware Supreme Court and specifically argued § 1084(d) in his oral argument there, so that the Delaware Supreme Court clearly had § 1084(d) before it when it denied reargument. It was so admitted by Petitioner in his oral argument before the United States District Court although he appears now (PB 21, 23) to deny having done so.

8. United States Supreme Court Appeal

Concurrently with his action for injunctive relief based on jurisdictional grounds before the United States District Court, described in the next paragraph, Appellant petitioned the United States Supreme Court for a writ of certiorari to the Delaware Supreme Court. The petition for certiorari was denied. *Delaware Sports Service v. Diamond State Telephone Company,* 378 U. S. 965 (1965).

9. Motion for Preliminary Injunction in United States District Court

On August 20, 1964, Delaware Sports Service filed a Motion in the United States District Court for the District of Delaware for a Preliminary Injunction. This Motion followed one filed on August 14, 1964, for a Temporary

Restraining Order which had been denied by the District Court. These actions were concurrent with the aforementioned petition for certiorari to the United States Supreme Court and sought to establish that the District Court had jurisdiction of the case. Following submission of briefs, the Court asked for further simplification of the issues by means of letter memoranda (P. App. 61a). After oral argument (P. App. 73a-94a), the Court issued its Opinion (P. App. 95a-104a) which held in favor of the Telephone Company and the State. *Delaware Sports Service v. Diamond State Telephone Company*, 241 F. Supp. 847 (D. C. Del. 1965). Plaintiff's Motion for Reargument (P. App. 105a) was denied (P. App. 108a). The Court's Final Order of May 13, 1965, thus denied Plaintiff's request for an injunction and dismissed the Complaint. The appeal to the Court below followed.

10. Appeal to the United States Court of Appeals

The Court below affirmed *per curiam* the Order of the District Court. 355 F. 2d 929 (1966) and reprinted in P. App. 1a. The petition to this Court followed.

Analysis of Facts in Record Below.

1. Nature and History of Petitioner's "Business"

In the early days of their business, the Tollins received horse racing information from Continental Press Service, a service subsequently put out of business by the Kefauver Committee (R. Com., H-557).[5] A great deal of information about each race had been disseminated by the Tollins, as the court found in *Tollin v. State, supra.* Upon discontinuance of major sources of track information, Joseph Tollin set up his own system for rapidly transmitting race results from inside the track to his racing news headquarters in Wilmington. This system consisted of having a "pitcher" inside the track give wigwag signals or other pre-arranged signals to a "catcher" just outside

5. See also *McBride v. Western Union Telegraph Co.*, 77 P. U. R. (NS) 65, 171 F. 2d 1 (9th Cir. 1948).

the track who relayed the information to Sports Service in Wilmington where it in turn was distributed to various customers throughout the country (R. Com., H-9, 57, 60-63; JTDC-243-46).[6] See also *People v. Pollack*, 204 Misc. 64, 120 N. Y. S. 2d 363, 364-365 (1953).

Subsequent to the passage of the present statute in 1952 (particularly Section 674) prohibiting dissemination of horse-racing information for gambling purposes or in furtherance of gambling, the Tollins changed their mode of operation and tailored the kind of racing information flashed to customers to include only the unofficial winner of a given race (R. Com., H-526, 592; JTDC-248, 264). This information is the key information to off-track bettors and bookmakers for the following reasons: (a) the unofficial winner is almost always the final official winner (R. Com., H-132, 212); (b) the service is so rapid (varying from instantly to no more than a minute) (JTDC-249; R. Com., H-632). In fact, the service is so fast that a customer, by holding open a telephone line to Sports Service from just before the time a race should start can establish the times of actual race start and finish with the accuracy needed by a bookmaker to prevent being past-posted or to engage in past-posting illegal off-track bettors (R. Com., H-608; PX-3, p. 306). Since there are usually fixed intervals between races, e.g., 30 minutes, knowledge of the actual time of the first race allows the customer accurately to calculate the times of subsequent races that day (JTDC-249-50); (c) having up-to-the-minute information on winners helps the bookmaker in making decisions on "lay-offs" on subsequent races; (d) it stimulates further betting by informing the bookmaker's customer if he

6. In Florida, such methods for obtaining and distributing horse racing information prior to 30 minutes from the end of the race, with exceptions not pertinent here, is a violation of Florida laws (R. Com., IX-8; H-87-92, 110-111, 115). "JTDC" will hereafter refer to the testimony of Joseph Tollin before the District of Columbia Public Utilities Commission on April 23, 1958, made a part of this record by Exhibit "C" to Stipulation of August 10, 1961 (R. Com., D-6). The page numbers refer to that transcript.

has won, thereby allowing him to place further bets the same day (R. Com., H-130-33, 182-184).

An example of the attempt by Delaware Sports Service to tailor its operations to avoid the present statute is the unexplained contention of Albert Tollin that telephone calls from within the State of Delaware are not accepted by Sports Service.[7]

The Tollins have always conceded that speed in transmitting results is their stock-in-trade and that they would be out of business without it (R. Com., H-581, 619, 622-23, 627). Joseph Tollin readily admitted that their service is faster by some 12-40 minutes than the other services, including Armstrong and Triangle, corroborating the testimony of other witnesses (R. Com., H-376, 515-518, 616; JTDC-249, 256). Even Albert Tollin so concedes (R. Com., PX-3, p. 341). It is only when some feature race is radioed or televised directly, either as a public service of the network or for a paying advertiser, that Sports Service's timing is equalled or bettered, but these instances are infrequent.

2. Customers of Delaware Sports Service

The procedure for obtaining information from Sports Service is fixed and simple. A person using any name he chooses sends in to Sports Service a Western Union money order of $20 for one result, $30 for two results, $40 for three results, or $50 for four or five results (R. Com., H-603, 605). Later, allowing sufficient time, approximately 1½ hours (R. Com., H-622-23), for receipt of the money order, he calls in to Sports Service and receives the number of track results he has paid for from the track of his selection (R. Com., H-77-81). Fictitious names and addresses are commonly used by the subscribers, and the money order

7. Compare Albert Tollin's inability to give a reason for not selling to Delaware customers (R. Com., H-666) with his unconvincing alleged method of distinguishing such calls by their degree of clarity (R. Com., H-682) and his admission that he did not know where the calls came from (R. Com., H-655).

and calls for service may emanate from different locations (R. Com., H-88, 195, 110, 113; JTDC-246). While Albert Tollin maintains that Sports Service operators always admonish the callers that the information is not to be used illegally (R. Com., H-561), there is no way of checking on one already engaged in illegal betting.[8] If the payment is received in advance, the information is always given out (R. Com., H-603).

As a matter of fact, Albert Tollin claimed that he has never tried to find out who his customers are (R. Com., H-539). He conceded that the flash service was of value to bookmakers (R. Com., H-627-28) but that he has never tried to ascertain whether or not any of his customers are bookmakers. He has not even checked the names of customers (Mitchell Slifken, Santo Damiano, and Frank Sorrentino) who the McClellan Committee in their hearings of August 22-31, 1961, advised him are bookmakers (R. Com., H-564). He claimed not to know whether the names used by customers are fictitious (R. Com., H-562). With respect to the *one* customer whom he had *met*, he said he would not be surprised to learn that he was in the business of disseminating horse racing information (R. Com., H-553, 575, 576, 619). He later testified that he sold results to Angelo Rossetti in Boston and also received horse racing information from him (R. Com., H-661, 681). Rossetti has a long criminal record including gambling offenses (R. Com., IX-15).

Albert Tollin purported to believe, moreover, that bookmakers would have little use for his services and that his customers were really touts, horse owners, horse trainers, or persons who send bets via others to the track (R. Com., H-549-52, 566-67). The alleged reason why these people pay for his expensive service rather than wait a half-hour and receive it free from regular press services is that they must relieve their extreme anxiety and cannot wait (R. Com., H-581-83). This contention is made even

8. See Commission's Findings, R. Com., D-19, p. 17.

more amazing by the testimony of an accountant for the McClellan Committee that the average *annual* gross income of Sports Service for the years 1955 to 1960 was approximately $262,700 (R. Com., PX-3, p. 322). Albert Tollin was unable to name a single person in these categories who subscribed to his service (R. Com., H-566, 567, 569). In contradiction, Joseph Tollin freely conceded that none of these persons would have a use for the service (JTDC-249-51, R. Com., IX-14).

It is well to recognize at this point that Albert Tollin not only disclaimed knowledge of his customers but also disclaimed any expertise in the bookmaking business (R. Com., H-557). More importantly, he corroborated the testimony of others that his father, Joseph Tollin, was an *expert* on both horse racing and bookmaking (R. Com., H-381, 557-559). The only conclusion possible, therefore, from Albert's own testimony, is that greater weight is to be given the testimony of his father, Joseph, than his own with respect to the uses of the information disseminated by Sports Service.

3. Joint Statement of Joseph and Albert Tollin Dated April 14, 1958

Both Albert and Joseph Tollin signed, on April 14, 1958, a revealing statement (R. Com., IX-14) as to their business. This statement was witnessed by State Detective Walter J. Wassmer and Thomas LaVernia, an investigator for the Chesapeake and Potomac Telephone Company. The significant part of the statement reads:

> "Our business is to get flash results to our customers before the radio and newspaper announcements. We have to do this to survive. Our services have practically no value except to bookmakers and professional bettors."

Albert's later lame assertions that he did not want to upset his father (R. Com., H-558-59) and that he did not read the

statement (R. Com., PX-3, p. 304) as excuses for his signing should be given little weight in the light of his foregoing admissions.

4. Joseph Tollin's Testimony Before District of Columbia Public Utilities Commission

Subsequently, on April 23, 1958, Joseph Tollin testified before the Public Utilities Commission of the District of Columbia, in connection with an application of a company named Sports News Service, Inc., for telephone service in Washington, and commented further on the need of bookmakers and professional bettors for his service (JTDC 249-50; emphasis supplied):

> "Q. Is there a need for that service?
>
> A. There is a need for that type of service, because so many different sections want to know the off time of that first or particular race so that they can then judge for the rest of the day what they are going to be able to do. They don't have to call back for the service no more. Laurel is going off at 1:30, which is official time for it to go off they know it goes off at 1:38, they know they have got five to eight minutes in each race that they can lag behind and still be in the clear.
>
> Q. Why is that necessary, to know whether they are in the clear or not?
>
> A. *Well, if they are interested in taking bets or making bets, it works both ways.*
>
> Q. I wish you would explain to me, sir. Why is it so important to know what is the off time of the race?
>
> A. Well, it is important to know that because those conditions can be—*you have more time to know how you are able to take a bet.* See, a lot of people come in late, and *a lot of people want to bet after they are over,* too, if you are foolish enough to take the bet.
>
> Q. So people who are interested in taking bets want to get the fastest service available, is that right?

A. That's right.

Q. *For two reasons, to know how late to take a bet and also to keep somebody from betting on a race that's already been run.*

A. *That's right.*"

Joseph Tollin further freely testified (JTDC-256; emphasis supplied):

"Q. Is their service of any value to bookmakers?

A. Yes, sure. See, no service is just as valuable to bookmakers, because if he wanted to take his business up to one o'clock and stop, he can go to the next day and it's just as valuable to him; that's the end of it.

Q. *But your service is more valuable?*

A. *It's more valuable, because he can get a larger amount of business by being able to stay in business till two o'clock, three o'clock, and so on, to the end of the——*

Q. *The rest of the afternoon, hey?*

A. *Until the afternoon is over.*"

It is important to realize that Joseph Tollin was referring to the same kind of race result, i.e., the name and post number of the unofficial winner, as is disseminated by Sports Service today. Furthermore, the evidence is uncontroverted that Joseph Tollin was the organizer and guiding light of Sports Service until his death in 1960 and understood fully the uses being made of its service. It is submitted also that Albert Tollin's detachment from his customers and apparent lack of knowledge of their uses of his information are all part and parcel of the carefully contrived mode of operation tailored to minimize the risk of Sports Service being held in violation of our gambling laws.

5. Testimony of Law Enforcement Officials

At the expense of prolonging this Brief, the State feels it is advisable to place before the Court an analysis of the

testimony of the law enforcement officials who testified. The purport of their testimony must be placed in its proper perspective because of the fact that Petitioner often has quoted portions of this testimony out of context and otherwise unfairly presented it.

The witnesses called by Intervenor included highly placed law enforcement officers from several states, as well as a member of the Thoroughbred Racing Association Protective Bureau. These are some of the persons from outside Delaware who have participated in the effort to rid Delaware of this valuable aid to organized gambling.

It is important to reiterate at this point that the Delaware Public Service Commission based its decision on evidence of sound probative value. While the rules of the Commission allow it to admit hearsay and opinion (Rule 183), and a considerable amount of such evidence entered the record from both parties, the Commission distinguished such evidence so as to ground its decision on evidence following the technical rules. The following summary is, therefore, not a complete summary of all the evidence introduced, but some of the evidence having probative value supporting the findings of the Commission.

Former Delaware State Detective Walter J. Wassmer testified[9] as to the toll analyses he secured by use of an Attorney General's subpoena. These official records of the Telephone Company showed telephone calls between Sports Service and other telephone numbers in and out of the State. Law enforcement officials in the states involved were requested to determine whether or not the persons to whom these numbers were listed had criminal records and specifically gambling records. These toll analyses have been made periodically in Delaware (R. Com., H-273-75, 291, 309, 383-84, 407). Out-of-state law enforcement officers also subpoenaed records of Western Union to ascertain who was sending moneys to Sports Service. These officers also made

9. Another aspect of Wassmer's testimony (i.e., the statement of Joseph and Albert Tollin, R. Com., IX-14) has been referred to previously.

toll analyses of calls to Sports Service from particular telephone numbers in their states (R. Com., H-19-26, 29, 55, 64, 67-76, 117, 124).

The Delaware investigation covered twenty-six states (R. Com., H-325-26). Due to the obvious limitations on funds, facilities, and personnel, representatives from all of these states were not brought to Wilmington to testify at the hearing before the Commission. Instead, Detective Wassmer testified at length on some of the states from which witnesses were not produced. His testimony is supported by official police records and communications from and to those states including the criminal records of some of the persons involved. Since many of these documents were prepared in the regular course of business, they are admissible under the formal rules of evidence. The states include Indiana, Illinois, Ohio, New Jersey, Pennsylvania, Massachusetts, and New York (R. Com., IX-4-7, 15, 16, 18, 20-25; R. Com., H-20-25, 277, 280-84, 294, 296-99, 311, 315-25, 360-62).

Detective Wassmer made personal visits to New Jersey, New York, Pennsylvania, and Washington, D. C., to verify the information obtained from the local officers (R. Com., H-275, 291, 293). Furthermore, the record shows that the telephone toll analyses were made in a legal manner (R. Com., H-274) and were based on toll slips and Telephone Company records personally compiled by Wassmer (R. Com., H-309, 383-84, 407). There is no merit to the suggestion that this information was illegally obtained in violation of 11 *Del. C.* § 757 or otherwise. It was unnecessary to refer to telephone conversations to obtain the desired information, which was available from regularly kept records of the Telephone Company.

Another technique used by law enforcement officers was the use of mail surveys. From a 30-day survey beginning March 11, 1960, of Sports Service mail transmitted through the Wilmington Post Office, Detective Wassmer was able to identfiy only one actual person, Kenneth Hanna. Hanna

had a criminal record which included arrest and conviction for gambling offenses (R. Com., H-364, 412-13).

Witnesses from the State of New York were Francis X. Smith, Chief of the Rackets Bureau of the District Attorney's Office of Queens County; Benjamin Kossoff, Queens County Detective; and Daniel D. Moynihan, Special Agent with the New York State Commission of Investigation.

Mr. Smith testified that he has been investigating the activities of Sports Service and its employees in New York since late 1952 (R. Com., H-8), when he met Ralph Atlas, alias Rudolph Atlas, Joseph Tollin's overseer of the pitcher-catcher teams (R. Com., Ex. C., p. 243). See *People v. Pollack,* 204 Misc. 64, 120 N. Y. S. 2d 363 (1953). Mr. Smith related how racing results were obtained from inside the track by Sports Service employees who immediately relayed the information by telephone to Wilmington (R. Com., H-9-10). Both Mr. Smith and Mr. Kossoff testified as to their continuing toll analyses of Western Union money orders sent to Sports Service (R. Com., H-29, 68-70); that over the years they had been able to find only one actual person, Frank Acetta, who had sent such a telegram, because of the fictitious names and addresses used by the other subscribers. Frank Acetta has a bookmaking record which was duly authenticated and admitted into evidence (R. Com., IX-4; H-26-28, 40, 42, 48, 50).

In addition to testifying on toll analyses, Mr. Kossoff described how he sent $30 in May 1961 by money order to Sports Service and then called in the next day to Sports Service and obtained the winners of the first and second races at Aqueduct for that day (R. Com., H-67-68, 71-72).

Mr. Moynihan described in detail the use of toll analyses in planning and conducting large scale raids, which he supervised (R. Com., H-117), on gambling joints in the State of New York (R. Com., H-121-141; R. Com., IX-5). As to the value to bookmakers of "flash" results, Mr. Moynihan added to the other reasons given (past-posting,

etc.) the value to the bookmaker in rapidly evaluating his position to determine whether he should "lay-off" bets on subsequent races that day or take more of them himself (R. Com., H-124-25). When asked how he knew that horse racing information received from Sports Service was being used for bookmaking purposes, his *personal* knowledge was described in detail in the record (R. Com., H-118-119).

Martin Dardis, Investigator for the Attorney General of Florida, testified that he telephoned Albert Tollin early in January, 1962, to ascertain if he could obtain Florida track information after Hialeah opened (R. Com., H-88). On February 6, 1962, Dardis sent Sports Service a $30 money order under the name of "Pete Taylor" for results on Hialeah's fifth and sixth races on February 9 (R. Com., H-104-105). On February 9, 1962, Lt. Frank Kappel, Dade County Police Supervisor, in the presence of Dardis telephoned from Florida to the Sports Service Wilmington telephone number OL 6-2501 and obtained the winner of the fifth race at Hialeah at 3:29 P. M. and the winner of the sixth race at 4:00 P. M.. The information on the fifth race was obtained within a few minutes of the finish of the race. Kappel actually waited on the telephone while the race was being run, in spite of the fact that Florida has the aforementioned 30-minute delay law (R. Com., H-105-110).

Edward C. McMahon, an Agent for the Thoroughbred Racing Association Protective Bureau (T. R. A. P. B.), testified as to the great value of flash race results to off-track bettors (R. Com., H-180-84) and to the stringent measures most race tracks have instituted to prevent flash dissemination (R. Com., H-178-79, 212).

In addition to the *personal knowledge* attested to by the witnesses, as outlined in this summary and given in full detail at the hearing, it was the *expert opinion* of *all* the law enforcement officers who testified, that the information disseminated, i.e., the name and number of the official winner of a race, is usable only by bookmakers and professional bettors (R. Com., H-31-32, 44, 45, 48, 52, 59, 124, 125,

131-38, 151-53, 155-56, 377). The T. R. A. P. B. official, another expert, corroborated these opinions (R. Com., H-179-86, 207-08, 216). For this reason flash dissemination of racing information is prohibited by the Code of the T. R. A. P. B. and the Maryland Racing Commission (R. Com., H-218, 472, 482, 485-86, 489, 491). Joseph Tollin, himself, stated this to be the only possible use (R. Com., IX-14).

6. Petitioner's Evidence

The witnesses called by Delaware Sports Service not only failed to rebut the record made by Intervenor, and they not only failed to show any legitimacy to the operation of Delaware Sports Service, but these witnesses themselves fortified the State's position.

The Petitioner's attempt to compare its activities with those of legitimate established radio stations and newspaper media is obviously without merit.[10] There are, of course, many crucial differences and, as one witness testified, such a comparison is unfair (R. Com., H-346). The most important difference, of course, is the speed with which a racing result is brought from the track to the user. The media represented by witnesses in this phase of the Petitioner's case are in the general news business and obtain their income from advertisers, not subscribers to their broadcast services (R. Com., H-344, 426-27, 439, 509). They do not have fictitious subscribers (R. Com., H-345) or subscribers paying them $20 to obtain the result of one race (R. Com., H-345). They obtain their racing information usually by means of the wires of a regular news service, such as the Associated Press, and are not in violation of the law (R. Com., H-343); i.e., they do not employ pitchers and catchers from inside to outside the track (R. Com., H-342, 421-26, 440, 448). They do not give out racing results to telephone callers and in no sense operate a call or

10. The Commission so concluded. Findings and Opinion, R. Comm., D-19, pp. 11-19.

flash service (R. Com., H-343-44, 425-26, 437, 452, 507-08, 510). Most importantly they all testified that there is a considerable time delay between the end of a race and the time of any broadcast they make concerning the race, except for special events (R. Com., H-422, 468-70, 504). In fact, the testimony establishes that elimination of this time lag would violate F. C. C. regulations and policy (R. Com., H-344-45, 427-28, 507-08), which were set up for the specific purpose of preventing the use of flash horse racing results by bookmakers.

Another witness for Petitioner, the Vice President and General Manager of Delaware Park, described the facilities and method of operation used by regular news media to transmit race results out of the track to their offices. A pertinent fact is that the public telephones at the track are not allowed to be used throughout the racing period of the day to prevent their use at that time in transmitting results (R. Com., H-489-91).

Conclusion Regarding Petitioner's "Statement of the Case"

Since the party which is presenting this case to the Court has seen fit not to explain the entire facts which are in the record of the proceedings in the State courts or to discuss the totality of the findings of the Commission and courts whose decisions it questions here, we have found it necessary in the preceding pages to set forth the facts perhaps more fully than is ordinarily required.

REASONS FOR NOT GRANTING THE WRIT

SUMMARY OF THE ARGUMENT

I. 18 U. S. C. § 1084(d) Does Not Preempt the Field.

The legislative history and the language of 18 *U. S. C.* § 1084(d) are clear that this statute was intended to aid and assist the state police power in controlling illegal gambling and is not preemptive in any way.

II. The State Court Decision Is Res Judicata.

The facts of this case bring it within the purview of *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470 (1930); *U. S. v. Silliman*, 167 F. 2d 607 (3d Cir. 1948), cert. den. 335 U. S. 825 (1948); *Kaufman v. Shoenberg*, 154 F. Supp. 64 (D. C. Del. 1954), and require the application of *res judicata*.

Petitioner voluntarily chose and remained in the State courts as long as possible. All relevant Federal questions were faced and decided in the State courts. The Petitioner, therefore, does not come within any of the exceptions to *Grubb* provided by *England v. Louisiana Medical Examiners*, 375 U. S. 411 (1964).

ARGUMENT.

I. 18 U. S. C. § 1084(d) Does Not Preempt the Field.

When the Delaware Public Service Commission decided on December 14, 1961, that it had jurisdiction, the Federal statute 18 *U. S. C.* § 1084(d), on which Petitioner now relies, had been in effect approximately three months. Except in his Motion for Reargument before the Delaware Supreme Court, in the State Court proceedings Petitioner did not advance § 1084(d) as a basis for Federal, rather than State, jurisdiction. He did contest State jurisdiction on the basis of 18 *U. S. C.* § 1084(d) when he brought his action before the Federal District Court in 1964, but this was after the Delaware Supreme Court had faced and decided this Federal question. It is significant that Petitioner did not promptly move to the Federal forum soon after the enactment of 18 *U. S. C.* § 1084(d), but instead elected first to exhaust every procedure possible in the State forum.

Irrespective of the history of Petitioner's attitude towards jurisdiction, neither § 1084(d) nor any other Federal legislation preempts the field so that the Commission should not have assumed jurisdiction as it did. The legislative history of § 1084(d), contained in House Report No. 967, 87th Cong., 1st Sess. (1961), U. S. Code Congressional and Administrative News 2631 and 2633-34, makes it crystal clear that the purpose of the law was to "assist" and "aid" the States in suppressing illegal gambling activities by depriving them of the use of communication facilities. Preemption obviously was not the purpose.

The language of § 1084(d) itself makes it abundantly clear on its face that § 1084(d) is not preempting the field. It may be brought to bear when either a "Federal, State, or local law" is violated. Specific mention is made of determinations "in a Federal Court or in a State or local tribunal or agency."

Not only are Petitioner's contentions as to preemption by § 1084(d) wholly without merit, they constitute an attempt to misapply § 1084(d). The section comes into play when it is necessary *to compel* an uncooperative or reluctant telephone company *to terminate* service. In the case at bar, the telephone company believed that Petitioner's service was being wrongfully used and voluntarily moved to terminate it. The action here is by Petitioner *to compel* the telephone company *not to terminate* service. As pointed out in the Opinion of the District Court (P. App. 2a-13a), Petitioner's construction of § 1084(d) would prevent the voluntary termination of service and limit it only to actions initiated by the Government, a result clearly contrary to the stated purpose of the law.

The Delaware Public Service Commission correctly determined after briefing by counsel that it had jurisdiction of this case. Opinion of Public Service Commission, December 14, 1961. The question of jurisdiction was considered at great length and the Commission's conclusions were set forth fully and need no further amplification here. It should be noted, in conjunction with this opinion, that the parties had stipulated by Paragraph 3 of the Stipulation of August 10, 1961, that Petitioner operates a "call service" as defined in 11 *Del. C.* § 671, and had thereby brought Petitioner's business also within the purview of § 674.

One pertinent conclusion of the aforesaid opinion was that the Commission could have jurisdiction even on the premise that all telephone calls to Petitioner came from outside Delaware. This was a result of the fact that the telephone company still operates a service or system within Delaware for public use, and jurisdiction still is founded on 26 *Del. C.* §§ 101, 121, 124, 134.

The premise that all calls came from outside Delaware was not conceded, of course, by either the Attorney General or the telephone company. It was, in fact, later refuted by evidence before the Commission (R. 236, 252, 255). It was also shown at the hearing before the Commission that Western Union money orders paid in advance for service as required by Petitioner, might be sent to Petitioner from outside Delaware by persons who might then call Petitioner from within Delaware to obtain racing results (R. 391, 683). Albert Tollin's claim (R. 666) that telephone calls from within Delaware are distinguishable by their degree of clarity is a fantastic contrivance and in contradiction to his other testimony that he did not know where the calls came from (R. 655). The claim is contrary also to his whole studied attempt to minimize knowledge of his customers. Petitioner cannot be heard to say that it operates solely interstate.

It is also clear that the language used in the notices of the Attorney General to the telephone company is not confined to 11 *Del. C.* § 674 but fully meets the requirements of 11 *Del. C.* § 674 and 18 U. S. C. § 1084(d). There is no indication whatsoever in either notice that Petitioner's business is exclusively intrastate or interstate. In fact, the implication of the notices is that Petitioner's business moves both ways. Further, even if it were conceded, and it is not, that the language used relates only to § 674, there is no reason for contending that § 674 applies solely to intrastate commerce. Nor is there any reason for contending that 18 U. S. C. § 1084(d) pre-empts the field of interstate commerce.

It is well settled that a state may exercise concurrent or independent power in all cases except: (1) where power is lodged exclusively in the Federal Constitution, (2) where power is given exclusively to the United States, and (3) where, from the nature and subjects of the power, it must be exercised exclusively by the United States. *Gilman v. Philadelphia,* 3 Wall. (U. S.) 713, 18 L. Ed. 96 (1866);

Houston v. Moore, 5 Wheat. (U. S.) 1, 5 L. Ed. 19 (1820). See also *Southern Pacific Co. v. Arizona,* 325 U. S. 761 (1945). The instant case does not fall within any of these exceptions, and, therefore, concurrent or independent power may be exercised by the State of Delaware to the extent that there is no inconsistency or conflict with Federal statutes. *Savage v. Jones,* 225 U. S. 501 (1912); *McBride v. Western Union Telegraph Company,* 171 F. 2d 1 (9th Cir. 1948); *McInerney v. Ervin,* 46 So. 2d 458 (Fla. Supreme Ct., En Banc, 1950). It is not to be presumed that a Federal statute supersedes the exercise of the police power of a state unless the intention to do so is clearly manifested; the exercise of Federal supremacy is not lightly to be presumed. *Schwartz v. Texas,* 344 U. S. 199 (1952).

It is well established that interstate commerce is not immune from the exercise of the police power of a state. This is particularly true in the regulation of gambling. As stated in 11 *Am. Jur.,* "Commerce," § 102, Page 91:

> "Gaming—A gambling transaction involving an instrumentality of interstate commerce appears to be subject of both Federal and state regulation or prohibition if there is no conflict between the state and Federal regulation on the subject."

There is no conflict between any of the laws of Delaware and 18 U. S. C. § 1084(d). In fact, they complement and reinforce each other.

The cases are numerous that illustrate the proposition that a state may exercise its police power to regulate and control gambling. This may be done by means of statutes or it may be done in the absence of a statute. A utility may terminate its service even where there is no state statute. *McInerney v. Ervin,* 46 So. 2d 458 (Fla. Supreme Court, En Banc, 1950). As set forth in the Delaware Superior Court Opinion, a telephone company may take the necessary steps to discontinue its service where

it is reasonably satisfied that such service is being utilized by its customers against public policy, such as in the furtherance of bookmaking, an illegal enterprise in Delaware and other states. *Tracy v. Southern Bell Telephone & Telegraph Company,* 37 F. Supp. 829 (D. C. S. D. Fla., 1940); *Taglianetti v. New England Telephone & Telegraph Company,* 81 R. I. 351, 103 A. 2d 67, 70, 71 (Sup. Ct. 1954). A telephone company may also act to discontinue service where such service is against public policy. *Howard Sports Daily v. Weller,* 179 Md. 355, 18 A. 2d 210 (Ct. of App. 1941); *Hamilton v. Western Union Telegraph Company,* 34 F. Supp. 928 (D. C. S. D. Ohio 1940); *Rubin v. Pennsylvania Public Utility Commission,* 197 Pa. Super. 157, 177 A. 2d 128 (1962); *Lipton v. New York Tel. Company,* 125 N. Y. S. 2d 251 (1953).

It is clear, of course, on the face of 18 U. S. C. § 1084(d) that Federal, state or local law may regulate interstate commerce so as to suppress illegal gambling. There is no hint of Federal pre-emption in the statute, but instead an express recognition of the police powers of a state to suppress illegal gambling information moving interstate.

Turning to other contentions of Petitioner, he attempts (PB 9) to use again *Andrews v. Chesapeake & Potomac Tel. Co.,* 83 F. Supp. 966 (D. C. D. C. 1949) to his advantage although he has argued it since the proceedings before the Public Service Commission and it clearly is not apropos to the case at bar. The *Andrews* case, while decided prior to most of the other cases mentioned herein, is distinguishable, moreover, because it held only that telephone service could not be cut off merely upon receipt of notice from the U. S. Attorney. The court held, nevertheless, that evidence would be considered *even on affidavits.* The effect of *Andrews* was similarly construed in *Taglianetti v. New England Tel. and Tel. Co.,* 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954). In the case at bar, it was only after a lengthy hearing that the Delaware Public Service Commission is-

sued its opinion that Petitioner was indeed furthering illegal gambling and that his telephone service could be discontinued.

Petitioner next assails the decisions of the District and Circuit Courts below with what is really another due process argument and, therefore, is misplaced under the heading of preemption (PB 13-20). In fact, this due process argument of Petitioner does not belong in his Brief at all because it was fully expounded by him in his previous Brief before this Court. *Delaware Sports Service v. Diamond State Telephone Co.*, — Del. —, 202 A. 2d 568 (Del. Supreme Ct. 1964), cert. den. 379 U. S. 965 (1965). In any event, in this argument Petitioner attempts to use *Kelly v. Illinois Bell Tel. Co.*, 210 F. Supp. 456 (D. C. N. D. Ill., E. D., 1962), aff'd. 325 F. 2d 148 (7th Cir. 1963), and *Telephone News System, Inc. v. Illinois Bell Tel. Co.*, 210 F. Supp. 471 (D. C. N. D. Ill., E. D., 1962), 220 F. Supp. 621 (D. C. N. D. Ill., E. D., 1963), aff'd. *per cur.* 376 U. S. 782 (1964) to his advantage although both of these cases are squarely against him and uphold the position of the Respondents.

In *Kelly, supra,* there was no hearing but instead the United States sought to proceed under 18 *U. S. C.* § 1084(d) solely on the basis of an earlier criminal verdict on a related but different matter. The court in *Kelly* merely held that the prior verdict *per se* was not conclusive in showing, for the purpose of an action under § 1084(d), that the facilities were used to transmit gambling information in violation of law. In the case at bar, the proceeding has not been under § 1084(d), there is no reliance on a verdict in another matter, and, in any event, an extensive hearing was held wherein the probative evidence was such that Petitioner was found to be furthering illegal gambling. As the Delaware Public Service Commission stated:

> ". . . Based on the evidence in the record before us, we are constrained to find that Petitioner's service under its present arrangement was being used to aid

illegal gambling in several States, including but not limited to New York, New Jersey, Maryland, and Delaware. The record adequately portrays the information which justified Diamond State in moving to terminate Petitioner's service. Having viewed that evidence and the evidence produced by Petitioner to the contrary, we find the proof clear and convincing. We accordingly determine that Diamond State was justified in concluding that Petitioner was using its telephone service to promote illegal activity."

Even though the case at bar is clearly distinguishable from *Kelly, supra,* it should be recognized that Petitioner reads into *Kelly* far more than either this Court, the Seventh Circuit, or the Third Circuit have chosen to do. Furthermore, in case of any conflict, *Kelly* is superseded by *Telephone News System, Inc. v. Illinois Bell Telephone Company,* 220 F. Supp. 621 (D. C. N. D. Ill., E. D., 1963), aff'd. 376 U. S. 782 (1964) and its predecessor of the same name, reported in 210 F. Supp. 471 (1962). A close examination of this case reveals the true state of the law as proclaimed by this Court as recently as 1964.

In the 1962 case, originated by a letter of April 25, 1962, from the U. S. Department of Justice to Illinois Bell requesting discontinuance of service to Telephone News System, a one-judge Federal District court determined (on the same day that it decided *Kelly, supra*) that the News System's service violated the Illinois statute, § 28-1(a)(10) of the Illinois Criminal Code of 1961. This statute provides that a person commits illegal gambling when he knowingly transmits information as to wagers, betting odds or changes in betting odds by telephones or similar means. The Court concluded that plaintiff violated this statute by playing a recording to anyone who dialed a widely advertised telephone number giving the names of the horses finishing first, second and third and the mutuel price paid by the winner, even though this information was obtained from United Press International Service at least twelve

minutes after the finish of the race and that, furthermore, an average of five or ten minutes of additional time necessarily elapsed before the received information could be recorded and transmitted to persons dialing the plaintiff's telephone number. Plaintiff did not receive any payment from those dialing in but relied solely on a $600.00 per week payment from Illinois Sports News for spot advertising commercials. While the Government did provide one bookmaker who admitted using the service, it is obvious from the Court's opinion that it relied heavily on the facts that plaintiff gave no credible legal use for its service, going out over 70 telephone lines, and that no one placing a legal bet at a race track would have any need to resort to plaintiff's facilities. Parenthetically, it should be noted that in the case at bar the information can be flashed instantaneously to customers; Plaintiff's telephone number is not widely advertised; he is paid by those receiving the information; all expert witnesses testified to the effect that Plaintiff serves primarily bookmakers; there is a signed statement by both Tollins admitting this fact; and there is no other logical explanation for his vast annual business. The Court in the 1962 case then went on to find that Plaintiff was not violating 18 *U. S. C.* § 1084(a) simply because that statute deals only with persons "engaged in the business of betting or wagering," an activity that Plaintiff concededly was not engaging in. The Court next found that Plaintiff's activities were in the ambit of § 1084(d), which provides that a common carrier, subject to the jurisdiction of the F. C. C., must shut off service, after reasonable notice, to any subscriber where the carrier has been notified by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that the subscriber is or will be using the facility or service for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law. § 1084(d) also states that it does not prejudice the right of a person affected to seek a hearing to secure

a determination that the service should not be discontinued. Since § 1084(d) had never previously been considered by a Federal Court, the Court in this 1962 decision decided that a three-judge District Court should be convened to pass on the constitutionality of § 1084(d). This led, of course, to the 1963 decision.

In the 1963 case, the three-judge District Court in a lengthy opinion upheld the constitutionality of both § 1084(d) and the Illinois statute. In doing so, the Court, among other things, completely refuted the argument often made by Petitioner here that everything is gambling information. The Court made the point that whether or not the transmission of particular information is a crime under given circumstances is to be determined not by reference to the term "gambling information" in § 1084(d) but by reference to Federal, State, and local criminal laws which proscribe the sending of gambling information over wire communication facilities (at page 625). In the case at bar, it is 11 *Del. C.* § 674, public policy, the *Delaware Constitution*, Art. II, § 17, and 11 *Del. C.* §§ 671 et seq. that prohibit the furtherance of illegal gambling. It was the finding of the Public Service Commission that Petitioner has been furthering illegal gambling, and it would be the dictate of § 1084(d) and case law that Petitioner's service be discontinued. The Court made the further point that the shutting off of service is not punitive or penal in character but is preventive and regulatory. The whole argument that Petitioner makes wherein he claims that he is being deprived of his life-blood property right without having been found guilty of violating a law is completely exploded by the Illinois District Court in the 1963 opinion. The whole purpose of legislation such as § 1084(d) and § 674, of tariffs such as the one involved in the case at bar, and of the public policy of not condoning or aiding illegal activities is to regulate telephone service so as to suppress illegal gambling. Petitioner's loss of service is incidental to the main object. In the case at bar, the shutting off of telephone service is not

an additional penalty for violating § 674 but it is a sanction to prevent the continued transmission of extremely useful information to bookmakers and thereby hamper and hopefully prevent their activities. The Court also mentioned a variety of other reasons why § 1084(d) is not penal in character.

In the concurring opinion in the 1963 case, which Petitioner discusses (PB 18-20), the concurring judge cogently set forth why he was disturbed that a subscriber's livelihood could be killed in a civil action whereas a criminal action would have imposed only minor fines and also why he was disturbed by the fact that the standard of proof is merely "a preponderance of the evidence" rather than "beyond a reasonable doubt." It is submitted, of course, that conviction in the criminal action would lead directly to discontinuance of telephone service assuming the subscriber did not change his activities to be within the law. The concurring judge, nevertheless, in spite of his doubts as to the overall policy involved, emphatically agreed that all past law was correctly applied in the majority opinion and that the result obtained there was inevitable.

This Court then affirmed the majority decision in the 1963 case, and the 1963 opinion stands as a clear and authoritative guide in deciding the case at bar in favor of the Respondents and against the Petitioner. This Court denied certiorari in 1964 of the case at bar, and Petitioner cannot be allowed to maintain that there are important and unsettled due process questions which should be settled by pronouncement of this Court.

It is submitted further that Federal preemption was not intended by enactment of 18 *U. S. C.* § 1084(d) and that there are no important and unsettled questions in this regard which require decision by this Court.

II. The State Court Decision Is Res Judicata.

Contrary to the contention of Petitioner (PB 20), the actual circumstances of this case do support the application of *res judicata,* as was found by the Court below.

Petitioner misstates the facts (PB 21, 23) when he asserts that the provisions of 18 *U. S. C.* § 1084(d) were not drawn into issue by a supplemental pleading (PB 21) and that the Federal question was not adjudicated by the Delaware Superior Court and the Delaware Supreme Court (PB 23).

The fact of the matter is that *Kelly, supra,* and *Telephone News System, Inc., supra,* both first decided on October 23, 1962, and both dealing primarily with § 1084(d), were briefed and argued before the Delaware Superior Court. Later, before the Delaware Supreme Court, these cases were briefed and argued again. In fact, Petitioner relied so heavily in his briefs before the Delaware Supreme Court on the *Telephone News System* case that the State devoted most of its oral argument before that court to the effects of the case, including § 1084(d) with which it dealt.

Further, it is a matter of record that Petitioner in his Motion for Reargument before the Delaware Supreme Court stated one of his grounds as follows:

> "4. The effect of this Court's decision is to permit a State Regulatory body to authorize discontinuance of service by a long lines operator controlled by the Federal Communications Commission in violation of the rules and regulations of the Federal Communications Commission and *the laws of the United States which have pre-empted this field.*" (Emphasis added.)

Subsequently, in his oral argument before the District Court, Petitioner argued vehemently that he had indeed brought § 1084(d) before the Delaware Supreme Court. This oral argument was recorded and the portion containing Petitioner's position at that time was actually included in

his brief before the Court below. It is remarkable that he now chooses to reverse the position he took before the District Court and adopt one which is not in conformity with the facts of the State proceedings. The State extensively treated the effects of § 1084(d) in its brief on Petitioner's first Petition for Certiorari before this Court which occurred while his action in the District Court was still under way.

Another distortion of fact by Petitioner is his dramatic assertion that he "was forced into the State forum at gunpoint" (PB 24). It is a matter of fact that Petitioner made no attempt to enter the Federal forum until after he had exhausted all the proceedings available to him under the State system. Furthermore, Petitioner cannot be heard to imply that 18 *U. S. C.* § 1084(d) had to be enacted and put into effect before he could proceed in a Federal forum. Surely the sophisticated legal counsel that has represented Petitioner from the beginning is not now saying that he was ignorant of Petitioner's rights in the Federal forum. Petitioner's stated unwillingness to be a litigant means only that he would have preferred to be left alone by the authorities so that he could continue without interference his highly lucrative activities of furthering illegal gambling.

Petitioner voluntarily chose to begin action in the State courts and he voluntarily remained there as long as possible. 18 *U. S. C.* § 1084(d) became effective September 13, 1961. It was not until December 14, 1961, that the Delaware Public Service Commission initially decided that it could even exercise jurisdiction. Then, and for that matter, at any time from the beginning of this case, Petitioner had a perfect right to apply for a temporary injunction against the threatened discontinuance of his service while he brought his case before a Federal court. This he never elected to do.

The case of *Yager v. Yager*, 7 Cal. 2d 213, 60 P. 2d 422 (1936), relied on by Petitioner (PB 20), has no application here because, *inter alia*, Petitioner did in fact file a supplemental pleading before the Delaware Supreme Court which

asserted the preemptive effects of Federal law. In any event, the *Yager* case which deals with narrow questions regarding the implementation of clearly conflicting California community property law, is not apropos to the case at bar where the fact situation is wholly different and where it is obvious that the new Federal law was fully known to all parties, was clearly before each State court, and was designed, not to preempt, but to aid the pre-existing State procedure.

Nor is the case of *Vassar v. Raines,* 274 F. 2d 369 (10th Cir. 1959), cert. den. 360 U. S. 936 (1959), 362 U. S. 982 (1960), of any aid to Petitioner (PB 22). In *Vassar,* the Court merely affirmed that a State court's interpretation of a charge in a Federal action was correct. The quoted dicta (PB 22) do not have the broad scope implied by Petitioner. Further, the fact situation of the case at bar is completely unrelated to that in *Vassar.*

The case at bar is clearly one for the application of *res judicata* as set forth in *Grubb v. Public Utilities Commission of Ohio,* 281 U. S. 470 (1930); *U. S. v. Silliman,* 167 F. 2d 607 (3d Cir. 1948), cert. den. 335 U. S. 825 (1948); *Kaufman v. Shoenberg,* 154 F. Supp. 64 (D. C. Del. 1954). None of the exceptions to *Grubb* provided by *England v. Louisiana State Board of Med. Exam.,* 375 U. S. 411, 419 (1964), is available to Petitioner.

It is submitted that there are no important and unsettled questions relative to this issue which should be decided by pronouncement of this Court.

CONCLUSION.

It is respectfully submitted, for the reasons discussed above, that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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